

CITY OF KOTZEBUE

IBLA 76-586

Decided August 20, 1976

Appeal from a decision of the Alaska State Office, Bureau of Land Management, rejecting a resolution adopted by the City of Kotzebue protesting the allowance of an application for withdrawal.

Appeal dismissed.

1. Delegation of Authority: Extent of -- Appeals -- Rules of Practice: Appeals: Generally -- Secretary of the Interior -- Withdrawals and Reservations: Authority to Make

Since the Bureau of Land Management has no authority to issue a public land order withdrawing land, such authority existing only in the Secretary, the Under Secretary, and the Assistant Secretaries of the Department of the Interior, recommendations by officers of the Bureau of

Land Management relating to withdrawals are not subject to review  
under the provisions of 43 CFR 4.450-2 or 43 CFR 4.410.

APPEARANCES: Alan Sherry, Esq., Merdes, Schaible, Staley & Delisio, Inc., Anchorage, Alaska, for  
appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

By decision of February 3, 1976, the Alaska State Office, Bureau of Land Management (BLM), rejected a resolution of the City of Kotzebue, which it treated as a protest to the allowance of an application by the Department of the Air Force for withdrawal of approximately 80 acres adjoining the Kotzebue Air Force Station for the protection of the water supply source of the Air Force Station. The city of Kotzebue filed a timely notice of appeal.

Subsequent thereto, the Kotzebue Native Corporation filed a petition to intervene and a motion to refer the case to the Alaska Native Claims Appeal Board as a more appropriate forum for consideration of the appeal. An examination of the case, however, has convinced us that quite apart from any question as to the jurisdictional boundaries between the two Boards, this

Board lacks jurisdiction to review that decision for a different and more fundamental reason.

This case involves the review of a recommendation by the Alaska State Office that a withdrawal be approved. In United States v. Foresyth, 15 IBLA 43 (1974), we examined a withdrawal application to determine whether or not the application complied with the provisions of 43 CFR 2351.2(b) and to ascertain the effect of its notation on the land office records. We expressly noted that we were not reviewing the substantive merits of a withdrawal, but merely ascertaining whether the procedural requirements mandated for such applications had been fulfilled. United States v. Foresyth, supra at 47. After reviewing the application to withdraw in Foresyth, the Board ruled that "the withdrawal application is defective and as a matter of law cannot be allowed until all the defects have been corrected," but pointed out that the notation of the application nevertheless segregated the lands sought therein. Id. at 54.

In the present case appellant has not questioned the procedural correctness of the Department of the Air Force's application to withdraw the land in question, nor has it even suggested that the application is defective. Rather, its objection is solely directed to the question of whether or not the withdrawal should

be allowed. The State Office considered the resolution adopted by the City of Kotzebue to be a protest within the ambit of 43 CFR 4.450-2. This we believe to have been error, for reasons which we will now set out.

[1] The resolution adopted by the City of Kotzebue opposing the allowance of the withdrawal indicated that the City protested the proposed action. The difficulty in calling this a "protest" within the meaning of 43 CFR 4.450-2 arises in that the regulation applies to any action "proposed to be taken in any proceeding before the Bureau \* \* \*." [Emphasis added.] Withdrawal of public lands, however, is not an action taken by the Bureau of Land Management, but is one which is committed to the discretion of the Secretary of the Interior. The BLM Manual makes it clear that the role of the State Office, and indeed, of the Director, BLM, is merely advisory. Withdrawal of land is effectuated by the issuance of a Public Land Order, 43 CFR 2353.1, and under the terms of section 3 of Executive Order 10355, 17 F.R. 4831, such an Order may only be issued by the Secretary, the Under Secretary, or the Assistant Secretaries of the Department of the Interior.

Thus, the BLM Manual provides that a Public Land Order "is an order effecting, modifying, or canceling a withdrawal or reservation, which is issued by the Secretary of the Interior \* \* \*."

BLM Manual 2310.11E. [Emphasis supplied.] The Manual then states that "[t]he order should be accompanied by a draft memorandum to the Secretary, for signature by the Director, explaining briefly the necessity for and the purpose of the order." BLM Manual 2310.16. It further provides that reference should be made in the memorandum to "protests" against the withdrawal.

While the views of the City of Kotzebue may be a relevant factor in the eventual decision of the Secretary, the fact that the State Office was not dissuaded from recommending approval of the withdrawal to the Secretary and so informed the City of Kotzebue is not a decision subject to appeal or protest to this Board. Inasmuch as the only decision regarding withdrawal is that of the Secretary, this Board has no authority to review an appeal or protest from such decision. 43 CFR 4.410. Moreover, it is our view that no authority exists anywhere within the Office of Hearings and Appeals to review decisions of the Secretary.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of the City of Kotzebue is dismissed. In light of our

disposition of the case, we make no rulings on the petitions filed by the Kotzebue Native Corporation.

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Newton Frishberg  
Chief Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

